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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

Nos. 12, 27 and 28 Consolidated.

No. 12.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, *Appellant*,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION and MILWAUKEE ROAD COMMUTERS' ASSOCIATION, *Appellees.*

No. 27.

UNITED STATES OF AMERICA, *Appellant*,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION and MILWAUKEE ROAD COMMUTERS' ASSOCIATION, *Appellees.*

No. 28.

INTERSTATE COMMERCE COMMISSION, *Appellant*,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION and MILWAUKEE ROAD COMMUTERS' ASSOCIATION, *Appellees.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR APPELLEE, MILWAUKEE ROAD COMMUTERS' ASSOCIATION.

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BRIEF FOR APPELLEE, MILWAUKEE ROAD COMMUTERS' ASSOCIATION.

PRELIMINARY STATEMENT.

These cases arise on separate appeals by Chicago, Milwaukee, St. Paul & Pacific Railroad Company (herein called "the Milwaukee Road"), the United States of America, and the Interstate Commerce Commission, from the decree of a three-judge District Court rendered on June 14, 1956 (R. 470-1).

The decree appealed from set aside and enjoined the enforcement of an order of the Interstate Commerce Commission authorizing and directing an increase in suburban passenger fares on the Milwaukee Road (Decree, R. 470-1; Opinion, R. 460-70, reported 146 Fed. Sup. 195).

The suburban lines to which the proceeding relates are the "West Line" of the Milwaukee Road operating between Chicago and Elgin, Illinois; and the "North Line" operating between Chicago and Fox Lake, Illinois, with one suburban train operating daily on the North Line in each direction beyond Fox Lake, Illinois, to the villages of Zenda and Walworth, Wisconsin.

All the fares involved are Illinois intrastate fares except the fares to Zenda and Walworth, Wisconsin.

The proceeding before the Interstate Commerce Commission arose on a petition of the Milwaukee Road, asking the Commission to conduct an investigation under Section 13(4) of the Interstate Commerce Act, to ascertain whether the intrastate fares, as established by the Illinois Commerce Commission, caused "undue, unreasonable or unjust discrimination" against interstate commerce. The interstate fares to the two Wisconsin villages were involved only because those fares must necessarily be fixed to

accord with the fares to the intervening Illinois suburban stations on the suburban line.

The District Court held that the order of the Interstate Commission finding that there was such discrimination, and authorizing an increase in the suburban fares involved, was not supported by the evidence or by the Commission's findings. The District Court therefore held that the order was beyond the authority of the Commission under the law and was invalid.

The ultimate question involved is whether the District Court was correct in so holding.

THE QUESTIONS PRESENTED.

The questions presented and the circumstances under which they arise are as follows:

1.

The Interstate Commerce Commission in this case established the suburban fares of the Milwaukee Road on the basis of what it determined the market would bear, without comparing the contribution to revenue made by the intrastate and interstate business.

The District Court held that the finding of the Commission that the intrastate rates caused undue, unjust and unreasonable discrimination against interstate commerce was not supported where there were no subordinate findings nor evidence in the record as to what contribution from suburban traffic would constitute a fair proportion of the Milwaukee Road's total income (R. 465).

The question is presented as to whether this holding of the District Court is correct.

2.

As a corollary to the question last-stated, the question is also presented as to whether or not there can be any finding that a rate of fare fixed by state authority discriminates unduly, unjustly or unreasonably against interstate commerce where, as here, there is no evidence that the intrastate rate attacked is lower than rates for similar service in interstate commerce.

3.

The increased rates for suburban fares on the Milwaukee Road were fixed by the Interstate Commission so as to equal the rates of the suburban fares in effect on the Chicago & North Western Railway. The Commission found (Fdg. 4, R. 37) that the increase in suburban fares, thus fixed by the Commission, will be "just and reasonable for the future.".

The District Court held (R. 467-9) that the last-mentioned finding and the increase in rates based thereon could not stand because: (a) not only was there no evidence offered showing similarity of equipment, service or operating conditions between the Milwaukee Road and the North Western, but the record, in fact, shows that the lines are not comparable; (b) there is no evidence to support the finding that the rates prescribed for the Milwaukee Road are "just and reasonable"; and (c) a carrier cannot justify unreasonably high rates on intrastate business on the ground that only in that way is it able to meet losses on its interstate business.

The question is presented as to whether this last-mentioned holding of the District Court is correct.

4.

The Section 13(4) proceeding was instituted by the Milwaukee Road after the conclusion of a proceeding before the Illinois Commission, in which the Milwaukee Road asked for authority to increase the rates here involved.

The hearing before the Illinois Commission showed that large savings would result if the Milwaukee Road shifted from steam to diesel operation of its suburban service. Using the cost figures submitted by the railroad itself, adjusted to reflect the estimated savings from shifting to diesel, the Illinois Commission denied the increase.

A few months after the decision of the Illinois Commission, the Milwaukee Road filed its petition with the Interstate Commission under Section 13(4), claiming that the rates thus fixed by the Illinois Commission in the hearing last referred to caused "undue, unreasonable and unjust discrimination" against interstate commerce (R. 25).

In presenting its case to the Interstate Commission, the Milwaukee Road used a different accounting theory from that presented to the Illinois Commission and included, as out-of-pocket costs, depreciation of equipment and charges for maintenance of way, not included, and expressly disclaimed as out-of-pocket expenses, in the proceeding before the Illinois Commission (R. 401-410; 274).

The District Court held that in this case the need for federal power to nullify state rates does not clearly appear and hence that the proceeding before the Interstate Commission under Section 13(4) could not be maintained, that the State Commission should first have been given a chance to fix fares on the evidence and basis presented to the Interstate Commission (R. 469-470).

The question is presented as to whether these last-mentioned holdings of the District Court are correct.

5.

The Interstate Commission, in its report, fixed the interstate suburban fares on the two trains to and from Zenda and Walworth, Wisconsin, "on the same basis as herein prescribed for intrastate application" (Fdg. 5, R. 37). No separate consideration was given to interstate fares. They were fixed to conform to the fares fixed for the intervening intrastate stations, and had no independent status.

The decree of the District Court adjudged the entire orders of the Interstate Commission increasing suburban fares to be invalid. The decree thus applied both to the

intrastate fares and to the interstate fares to Zenda and Walworth, Wisconsin (R. 471).

The question is presented as to whether the District Court erred in setting aside the Interstate Commission's order as to the interstate fares involved.

If the decision of the District Court on any one of the first four questions above enumerated is correct, then the decree appealed from must be affirmed.

STATEMENT OF THE CASE.

The Proceeding Before the Interstate Commerce Commission.

The proceeding before the Interstate Commerce Commission in which the order set aside by the District Court was entered, was instituted by petition of the Milwaukee Road.

The petition (R. 24) asked that the Interstate Commission conduct an investigation, under Section 13 of the Interstate Commerce Act, as to the effect on interstate commerce of the intrastate suburban fares in the Chicago area as fixed by the State Commission (R. 26-7).

The petition alleged that the Milwaukee Road, in October, 1952, had filed an application with the Illinois Commission asking for authority to increase suburban fares, and that the Illinois Commission had denied that application. The petition alleges in effect that the Illinois Commission conducted the hearings unfairly and so as to cause undue, unreasonable and unjust discrimination against interstate commerce (R. 24-25).

The petition asks (R. 27):

1. That the Interstate Commission find that the "intrastate coach fares within the Chicago suburban area made or imposed by authority of the State of Illinois cause, and will continue to cause, disadvantage to and undue, unreasonable and unjust discrimination against interstate commerce" in violation of Sections 3(1) and 13(4) of the Interstate Commerce Act; and

2. That the intrastate fares be increased, and that "like increases" be made in the interstate suburban fares to Walworth and Zenda.

The Interstate Commerce Commission, although it found that the out-of-pocket loss of the Chicago suburban operation was less than half the amount claimed by the Milwaukee Road, entered an order (R. 41) prescribing increased suburban fares estimated in the Commission's report (R. 34) to yield additional revenue of $383,000 per year. The Interstate Commission found (R. 34) that this additional revenue would be sufficient to eliminate an out-of-pocket loss in the suburban passenger service of $306,000 (which includes as a so-called out-of-pocket expense, $258,172 of depreciation and maintenance-of-way expense allocated to the suburban traffic), and to leave a balance of $77,000 to contribute to general overhead expense.

The Interstate Commission entered its order under Section 13(4) of the Interstate Commerce Act which gives the Commission power to fix intrastate fares where the fares fixed by state authority are found to have caused "undue, unreasonable, or unjust discrimination against interstate or foreign commerce."

The Interstate Commission made the following ultimate findings and conclusions on which its order is based (R. 36-7):

> "1. That respondent's [Milwaukee Road's] present suburban fares do not produce sufficient revenue to cover the out-of-pocket cost of the service and thus make no contribution toward its indirect costs nor to a return on investment.
>
> 2. That respondent's present intrastate suburban fares, made or imposed by authority of the State of Illinois, cause and, unless increased to the extent herein set forth, will continue to cause undue, unreasonable, and unjust discrimination against interstate commerce, in violation of Section 13(4) of the Interstate Commerce Act.
>
> 3. That such undue, unreasonable, and unjust discrimination can and should be removed by establishing

for such intrastate travel fares no lower than the bases set forth as prescribed in the appendix hereto.

4. That such prescribed fares will be just and reasonable for the future, will produce substantial additional revenue, and are necessary so that the travel thereunder may make a fair contribution toward respondent's indirect costs and return on investment, and to enable it, under honest and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service.

5. That respondent's interstate suburban fares on the same bases as herein prescribed for intrastate application will be just and reasonable for the future."

The Interstate Commission's order rests, therefore, upon the following propositions:

That the existing fares, as fixed by the State authority, cause undue, unreasonable and unjust discrimination against interstate commerce;

That the prescribed fares are necessary so that travel thereunder may make a fair contribution toward the Milwaukee Road's indirect costs and return on investment; and

That the prescribed fares will be "just and reasonable for the future".

Absence of Evidence of Discrimination.

There is no evidence in the record to show that the intrastate rates of fare are discriminatory as compared with the interstate passenger rates.

The Milwaukee Road introduced no evidence to show that existing intrastate passenger rates were lower than interstate rates for similar service.

The only evidence in the record as to interstate passen-

ger fares is a tabulation read into evidence by the present appellees showing certain interstate fares to be as follows: (R. 349-350)

From Chicago to:	Distance— Miles	Fare Cents per Mile
Walworth, Wis.	73	2.52
Sturtevant, Wis.	62	2.53
Milwaukee, Wis.	85	2.49
Janesville, Wis.	99	2.30
Madison, Wis.	140	2.32
Minneapolis, Minn.	421	2.42

NOTE: Walworth Wisconsin is on the north suburban line just beyond Fox Lake, and its fares are grouped with the Illinois intrastate fares to the intervening suburban stations. This is not true of the other interstate fares listed.

The comparable intrastate rate of fare as heretofore fixed by state authority ~~2.5~~ 1.5 cents per mile (R. 350), which, as the tabulation shows and the report of the Interstate Commission finds is substantially the same as the comparable interstate rate (R. 29).

The order of the Interstate Commission raises the intrastate rates (and the related suburban interstate rates to Zenda and Walworth, Wisconsin) to 3 or more cents per mile (R. 39). If that order goes into effect, admittedly the intrastate rates of fare will be higher than comparable interstate rates.

There is thus no evidence in the record to show that the existing intrastate fares, as fixed by the Illinois Commission, cause any discrimination against interstate commerce —certainly no evidence of the "undue, unreasonable or unjust" discrimination required to give the Interstate Commission jurisdiction.

FAILURE OF THE RECORD TO SHOW WHAT WOULD CONSTITUTE A FAIR PROPORTIONATE CONTRIBUTION BY THE MILWAUKEE ROAD'S SUBURBAN SERVICE TO THE TOTAL SYSTEM INCOME.

The District Court held:

That the finding of the Interstate Commission that the increased intrastate fares prescribed by it are necessary "so that travel thereunder may make a fair contribution" toward the Milwaukee Road's "indirect costs and return on investment," is not sufficient to sustain the Commission's order; and

That in order to give the Interstate Commission jurisdiction to determine intrastate fares, there must be evidence and supporting findings to show what contribution from the intrastate traffic would constitute a fair proportion of the railroad's total revenue.

There is no such evidence and no such supporting findings.

The relative contributions of the interstate and the intrastate passenger services to system income are not in evidence. There is no basis in the record for a finding, and there is no finding, as to what would be a fair proportionate contribution by the intrasfate passenger service.

ABSENCE OF EVIDENCE TO SUPPORT THE FINDING THAT THE INCREASED INTRASTATE FARES AUTHORIZED BY THE INTERSTATE COMMISSION ORDER WOULD BE JUST AND REASONABLE.

The order of the Interstate Commission directed that the Milwaukee Road suburban fares be increased to the current level of the suburban fares on the Chicago & North Western Railway and the Commission found that the amount of increase will be just and reasonable. That finding is essential to the validity of the order.

The finding rests on testimony of the Assistant General Passenger Agent of the Milwaukee Road, as set forth in the following colloquy (R. 179-180):

> "Exam. Fuller: Well, so far as the nature of the suburban communities you serve and the nature of your line—you have two lines. The North Western has three, I understand. Your territory is pretty similar.
>
> "The Witness: Well, in what respect, sir? You mean geographically or in operation, or what?
>
> "Exam. Fuller: I am just talking about the nature of the suburban community.
>
> "The Witness: Yes, you could probably say there is strong similarity.
>
> "Exam. Fuller: That is all I have. Are there any other questions now?"

Immediately following the foregoing testimony, the attorney for the Milwaukee Road said (R. 180):

> "May I make a comment here, Mr. Examiner * * *. We do not offer these North Western fares as criteria of what fares should be. These exhibits [showing comparison with North Western fares] are offered solely in response to the Examiner's request."

There is no evidence in the record to show similarity in operating conditions of the Milwaukee Road and the North Western Railway. On the contrary, the evidence shows that the lines are not comparable.

The suburban fares of the North Western were fixed to cover an operation that employed 72 steam locomotives and only three diesels (R. 347) as compared with the present complete diesel operation on the Milwaukee Road.

The comparison of the cost of the Milwaukee Road suburban operation by steam locomotives with that by diesel locomotives shows that the diesel operation costs the Milwaukee Road $900,000 per year less than a steam operation (See tabulation, p. 16, *post*).

The fact that rates fixed for the North Western Railway would not apply to operation with diesel engines was noted by the Commission when those rates were fixed (*Commutation and Multiple Fares Between Illinois and Wisconsin*, 288 I.C.C. 15). The Interstate Commission has also noted the fact that the Milwaukee Division of the North Western Railway which includes one of the North Western suburban lines, carries no freight whatever. (*Commutation Fares between Chicago and Wisconsin*, 279 I.C.C. 773, 777).

The only other suburban lines in the Chicago area using diesel locomotives are those of the Burlington and the Rock Island. The evidence showed that the suburban passenger fares of both those railroads were substantially the same as the fares in force on the Milwaukee Road at the time it petitioned the Interstate Commerce Commission for an increase (Pro. Ex. 26; R. 420; 287). No effect was given to that evidence (R. 34-5).

There is thus no evidence in the record to support the finding that the increased fares prescribed by the Interstate Commission are just and reasonable.

The Proceeding Before the Illinois Commerce Commission.

The order of the Illinois Commerce Commission, denying the Milwaukee Road's petition for an increase in suburban fares, is the basis of the claim of "unjust and unreasonable discrimination" by state authority against interstate commerce. A short statement as to the proceeding before the Illinois Commission is therefore called for.

The intrastate rates which the Interstate Commission in its order finds are unreasonably and unjustly discriminatory against interstate commerce, were continued in effect by the Illinois Commission in its order entered November 10, 1954. By that order the Illinois Commission,

after extensive hearings and a most thorough investigation, denied the petition of the Milwaukee Road for increase in rates and discontinuance of off-peak suburban trains (R. 92).

In the case before the Illinois Commission, the Milwaukee Road claimed an out-of-pocket deficit in Chicago suburban operation of $1,260,000, exclusive of depreciation and maintenance of way, which the Milwaukee Road then stated should not be considered as out-of-pocket expense.

At that time the suburban trains of the Milwaukee Road were operated wholly by steam locomotives.

The Illinois Commission found that the operating expenses of the Milwaukee Road were grossly overstated and furthermore, that according to the evidence, a substitution of diesel for steam locomotives would result in an annual saving in expenses of approximately $1,000,000 (R. 80, 82).

After the evidence had been introduced showing the saving that would result from dieselization, but before the order of the Illinois Commission was enforced, ENTERED the Milwaukee Road began the substitution of diesel for steam locomotives on its suburban trains. The dieselization of the suburban service was completed about September, 1954 (R. 137).

Despite the fact that full economies were not immediately realized, it is indicated by income statements for the last quarter of 1954 that the yearly savings on the suburban service from substitution of diesel for steam operation will be close to the $1,000,000 estimate above referred to. This is shown by the following tabulation:

COMPARISON OF SUBURBAN PASSENGER OUT-OF-POCKET EXPENSES (EXCLUSIVE OF UNION STATION EXPENSE) OF STEAM OPERATION ON 1952 BASIS WITH LIKE EXPENSE OF DIESEL OPERATION ON BASIS OF LAST FOUR MONTHS OF 1954.

	Out-of-Pocket Expenses	
	1952	1954
	Steam Operation	Expense as found by Interstate Commission on Basis of 4-month Diesel Operation Adjusted to Exclude Accounts Not Included in Figures Presented to the Illinois Commission
Total passenger operating expenses (including payroll taxes); excluding head end expenses—Ex. 21 (R. 395-400)	$2,616,196*	$1,847,006*
Savings in 1954		$ 769,190
Adjustment for increase in Wage Rate in 1954		
Estimated cost of labor in 1954 (⅔ total cost—(R. 147) $1,333,863)		
Increase over cost at 1952 Wage Rates, estimated at 6⅔% (Pet. Ex. 15, R. 392. 350		$ 82,171
Estimated savings from Diesel Operation after Adjustment for Higher Wage Rate		$ 851,361**

NOTES: * These figures are from Pro. Ex. 34 (R. 428-9; 345) adjusted to exclude "head end" expense.

** If increases in material prices are taken into consideration and allowance is made for the use of some steam locomotives during part of the 4-month period, the savings would considerably exceed $900,000.

Despite the statement to the contrary in the Milwaukee Road's brief (p. 4), the estimates of the Illinois Commission as to the savings from diesel operation are thus in substantial accord with the savings experienced—if we omit the depreciation and maintenance-of-way items, which were not submitted to the Illinois Commission, and if we make the further necessary adjustments noted in the foregoing tabulation.

The findings of the Interstate Commission in the present proceeding further show the propriety of the Illinois Commission's estimate that there would be little if any out-of-pocket loss after dieselization.

In the case before the Interstate Commission, the Milwaukee Road included in its out-of-pocket cost the charges for depreciation of equipment and maintenance of right-of-way used by both through and suburban trains, which were expressly excluded from out-of-pocket expenses in the case presented to the Illinois Commission.

If those charges are eliminated from the figures presented to the Interstate Commission, the $306,038 out-of-pocket loss found by the Interstate Commission to have been incurred in the suburban service in 1954 (R. 34) would be reduced by $258,172, leaving an apparent out-of-pocket deficit of $47,866. This would be reduced to $21,056 if effect is given to the increase in revenue experienced in the last four months of 1954, during all but two weeks of which the service had been dieselized.

The adjustments indicated are shown by the following tabulation:

OUT-OF-POCKET OPERATING STATEMENT FOR 1954

As Found By Interstate Commerce Commission (R. 34)		
Revenue (Actual for year)		$1,799,140*
Expenses (on basis of last 4 months, except actual for year for maintenance of way)	$2,269,404	
Less credit for non-revenue passengers	164,226	2,105,178
Out-of-pocket Deficit as found by Commission		($ 306,038)
As Adjusted to the Basis Presented to Illinois Commerce Commission		
Revenue (Actual for year)		$1,799,140
Expenses	$2,105,178	
Adjustments—expenses included by Interstate Com. Com. not claimed by Milwaukee Road in Ill. Com. Com. Case (less 3.2% to conform with the Int. C. C. elimination of head end expense):		
Depreciation (R. 32)	$188,764	
Maintenance of way (Ex. 34; R. 431, 345)	69,408	
Total adjustment	258,172	
Expenses as adjusted to basis presented to Ill. Com. Com.		1,847,006
Deficit for 1954 adjusted to basis presented to Ill. Com. Com.		($ 47,866)*

NOTE: * If revenues are adjusted to reflect the increase in the last four months of 1954 (Pet. Ex. 13A; R. 384; 137), the annual deficit would be $21,056. Further adjustments in expense items to allow for partial use of steam engines and non-suburban diesels during the base period would probably eliminate this deficit.

In the brief of the Milwaukee Road there is also criticism of the rejection by the Illinois Commission of an item of $290,000, claimed by the Milwaukee Road as part of the Union Station expense attributable to suburban operation. In rejecting that item, the Illinois Commission acted in accordance with a formula approved in the report of the Interstate Commission and followed by it in this case. The Union Station expense, as found by the Illinois Commission, is the same as that found by the Interstate Commis-

sion except for the inclusion by the Interstate Commission of an item of depreciation amounting to $27,563 (Rec. 33-4).

The finding of the Illinois Commission that, on the case presented to it, the fares theretofore established would not result in an out-of-pocket loss, is thus supported by the actual experience of the Milwaukee Road under diesel operation.

The report of the Interstate Commission also finds, that the order of the Illinois Commission was sustained by the case presented to it. As to this, the Interstate Commission's report states (R. 31) that the order of the Illinois Commission was "based on respondent's [the Milwaukee Road's] own showing modified to reflect the change in its suburban operations."

The Interstate Commission's report contains no statement or finding indicating that the Illinois Commission acted unfairly. On the contrary, the Interstate Commission's report clearly indicates that any need for changing the rates fixed by the Illinois Commission results from the failure of the Milwaukee Road to present the case to the Illinois Commission on the same basis as that on which the case was presented to the Interstate Commission.

As to this, the Interstate Commission's report states (R. 32-3):

> "* * * protestants' [this appellee's] lower figures are accounted for by elimination of any allowance for depreciation and of certain accounts for maintenance-of-way not included in respondent's [the Milwaukee Road's] study before the Illinois Commission.
>
> * * * * * *
>
> Respondent's explanation for the prior omission [*i.e.*, the omission of depreciation and maintenance-of-way accounts in its presentation to the Illinois Com-

> mission] was its impression that even without them, it had shown considerable deficit from this service. This explains, but does not excuse, its incomplete showing before the Illinois Commission."

Furthermore, as a direct result of the investigation made and the expert evidence adduced before the Commission in that proceeding, dieselization of the suburban service of the Milwaukee Road was brought about with great benefit to the Road and to the travelling public served by it.

The Decision of the District Court.

The decree of the District Court (R. 470-1) set aside the order of the Interstate Commission, enjoined its enforcement, and remanded the case to the Interstate Commission for further proceedings conforming to the Court's opinion.

The grounds upon which the decree rested, as stated in the Court's opinion, are as follows (R. 460-471):

1. The Interstate Commission states (R. 34, 37) that the intrastate rates which it approves "would eliminate the out-of-pocket deficit and result in a contribution to indirect costs and taxes of approximately $77,000 annually," and that those fares "will produce substantial additional revenue, and are necessary so that the travel thereunder may make a fair contribution toward respondent's indirect costs and return on investment * * *." But there is no finding (and, in fact, no evidence) to show what a "fair contribution" would be. As the District Court states (R. 464, 465):

> "* * * at no place does the commission make any findings as to what contribution from the intrastate suburban traffic would constitute a fair proportion of the railroad's total income. In fact, the interstate commission makes no finding as to what the Milwaukee Road's total income was for the year in question, and likewise no finding as to what would be a fair propor-

tionate share of total income of the road which the intrastate traffic now under consideration should contribute.

* * * * *

Nor is it sufficient that the interstate commission found that, to the extent that the suburban service fails to meet the out-of-pocket costs and make all the contribution that it reasonably can to respondent's indirect costs, it discriminates against its freight operations. This finding is no substitute for one as to what it should contribute as a fair proportionate share of the railroad's total income. Without the latter finding the order of the interstate commission cannot stand."

2. Furthermore, there is nothing in the evidence or in the report of the Interstate Commission that indicates the extent of the obligation of the suburban service to make a contribution to the indirect costs and taxes. As to this, the District Court states (R. 467):

"* * * we are here confronted with the imposition of an involuntary contribution being exacted by legal means. To be sustained, it must be based upon a finding of the extent of the obligation. It cannot be supported by a vague reference to an unascertained amount of 'indirect costs and taxes' or what the suburban service can reasonably contribute to the Milwaukee Road's 'indirect costs,' or 'a fair contribution toward respondent's indirect costs and return on investment.'"

3. There is no sufficient evidence to support the finding that the intrastate fares prescribed by the order are, or will be, just and reasonable for the future. As the District Court states (R. 467, 468-9):

"This finding rests on an averment in the report that the comparison with the fares of the Chicago and North Western Railway Company is more persuasive, as, in the words of respondent's traffic witness, 'there is a strong similarity between the suburban territory

served by the Milwaukee Road and that served by the North Western, * * *.' The evidence * * * does not support this averment * * *. There was no evidence offered showing similarity of equipment, service or operating conditions. * * * Without sufficient evidence of comparability of operation, there is no ground for fixing the Milwaukee Road's fares at the North Western level, or for finding that the resulting fares are just and reasonable."

4. The authority of the Interstate Commission to nullify the action of a State Commission (which has primary jurisdiction) in fixing or passing upon intrastate fares, arises only when the evidence shows that the State Commission's action was unduly, unjustly or unreasonably discriminatory against interstate commerce. That was not shown in this case. As the District Court states (R. 469-470):

> "In the state commission proceeding, which was initiated by the Milwaukee Road, the latter showed in its exhibits that the depreciation of locomotives and coaches was not included in the out-of-pocket cost. Likewise, in its exhibits in that case it did not include in out-of-pocket expense certain maintenance of way accounts involving maintenance of facilities, such as roadbed, etc. The comments in the interstate commission's report, in regard to these items, show that they were by the Milwaukee Road deliberately removed from the consideration of the state commission. It follows that facts presented by Milwaukee Road to and relied upon by the interstate commission to support its finding as to an out-of-pocket suburban deficit, were not presented to nor relied on by the Milwaukee Road in the state commission proceeding. If different evidence is to be offered or a different basis of fares is to be urged before the interstate commission, the state commission should have been given a chance to fix fares on the same evidence and the same basis.
>
> In *North Carolina* v. *United States*, 325 U. S. 507, at 511, the court said: 'Since the enactment of Section 13(4), as before its enactment, a state's power over

intrastate rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section. When this point—not always easy to mark—is reached, and not until then, can the Interstate Commerce Commission nullify a state-prescribed rate.'

Where a railroad seeks the fixing of higher intrastate rates by the interstate commission after failing in such endeavor before a state commission, Section 13(4) does not contemplate that the state commission is to be considered only a way station in a journey to the interstate commission. In the instant case justification for the exercise of the federal power to nullify state rates does not clearly appear from the record before us."

SUMMARY OF ARGUMENT.

We contend that the order of the District Court, setting aside the order of the Interstate Commerce Commission fixing the Milwaukee Road's suburban fares, should be affirmed for the following reasons:

I.

The Interstate Commerce Commission has no jurisdiction to pass on or to increase the intrastate passenger rates of the Milwaukee Road involved in this case, unless it clearly appears that the existing rates as fixed by the Illinois Commission result in discrimination against interstate commerce.

The Interstate Commission has no power to pass on, or to increase, intrastate fares on the ground that they do not produce sufficient revenue. That is a matter wholly for the state authorities.

Section 15a of the Interstate Commerce Act gives the Interstate Commission power to fix *interstate* rates on the basis of revenue, so that they may render a fair return. But that power is confined to rates for interstate traffic. Section 1(2)(a) of the Act provides that none of the provisions of the Interstate Commerce Act shall apply to transportation of passengers wholly within a state, and thus expressly excludes the application of Section 15a to intrastate passenger fares.

The power of the state authorities over intrastate fares is exclusive, up to the point where it clearly appears that the Interstate Commission has jurisdiction to intervene under Section 13(4) of the Interstate Commerce Act.

Section 13(4) operates as an exception to Section 1(2)(a), above referred to, and empowers the Interstate Commission to intervene and to increase intrastate fares fixed by State authority where it appears either: (1) that such fares cause undue or unreasonable advantage or prejudice as between persons or localities in intrastate and interstate commerce; or (2) where such fares as fixed by State authority cause undue, unreasonable or unjust discrimination against interstate or foreign commerce.

There is no claim here that the intrastate rates attacked cause advantage or prejudice as between persons or localities.

The Milwaukee Road rests its case on the assertion that the existing intrastate rates cause undue, unjust and unreasonable discrimination against interstate commerce.

The necessity to show the existence of discrimination—whatever its character—is thus the basic element of this case.

II.

There is no showing in this case of discrimination against interstate commerce because:

(a) There is no evidence to show that the rates of fare charged in the Milwaukee Road's intrastate passenger service are less than the rates charged for similar service in interstate commerce; and

(b) There is no evidence or finding as to what revenue is required from the suburban passenger traffic in order to constitute a fair proportionate contribution to the Milwaukee Road's total income.

A.

Discrimination against interstate commerce is not shown to exist unless it appears that the rates of fare charged for intrastate passenger service are lower than rates

charged for similar service in interstate traffic. If such differential is not shown, then there is no showing of discrimination against interstate commerce that would justify intervention by the Interstate Commission under Section 13(4).

There was no such showing in this case. On the contrary, the evidence shows that the intrastate rates of fare, for passenger service, as fixed by the Illinois Commission, are higher than comparable rates in interstate commerce.

B.

The report of the Interstate Commission rests on a finding that the increased intrastate fares prescribed by that Commission will produce "substantial additional revenue, and are necessary so that the travel thereunder may make a fair contribution toward respondent's [the Milwaukee Road's] indirect costs and return on investment." That finding does not show discrimination against intrastate commerce and will not sustain the Commission's order in the absence of evidence and a supporting finding showing what would constitute a fair proportionate contribution from the intrastate passenger service to the total system revenue as compared with like contributions from other parts of the system.

There is no such evidence or supporting finding.

III.

The report of the Interstate Commission finds that the increased intrastate rates of fare, prescribed thereby will be "just and reasonable for the future."

This is a necessary finding, but it cannot stand unless there is evidence to support it. There is no such evidence.

The finding rests on a comparison of the rates fixed by the Interstate Commission's order for the Milwaukee

Road's suburban service with the rates in effect in the suburban service of the Chicago & North Western. That comparison does not support the finding. There is no evidence of similarity between the suburban operation of the Milwaukee Road and that of the North Western. On the contrary, the evidence shows dissimilarity; and the order of the Commission fixing the suburban rates of the North Western expressly stated that the rates so fixed would not apply to diesel operation (see pp. ~~43~~ to ~~47~~, ~~above~~). 45 46 BELOW

IV.

The existing intrastate passenger rates of the Milwaukee Road were fixed by the Illinois Commission, by order entered November 10, 1954, in the proceeding summarized at pages 14 to 20, above.

The Interstate Commission has no jurisdiction under Section 13(4) to intervene and nullify the order of the Illinois Commission unless it is clearly shown that that order caused an undue, unreasonable, or unjust discrimination against interstate commerce.

There is no such showing.

The order of the Illinois Commission and the rates of fare fixed thereby were just and reasonable on the evidence and theory of accounting adopted by the Milwaukee Road in presenting the case to that Commission.

There is thus no basis for a charge that the order of the Illinois Commission was unfair or caused "undue, unreasonable or unjust" discrimination against interstate commerce.

If the Milwaukee Road wished to present its case on a different theory of accounting, and on a different evidence as to its costs, it should have gone again to the Illinois Commission, which has primary jurisdiction over intrastate rates.

V.

The increase in the interstate fares between Chicago, Illinois, and Zenda and Walworth, Wisconsin, prescribed in the order of the Interstate Commission, rested wholly upon the increases made in the intrastate fares to the intervening Illinois stations and depended for its validity on the validity of the increases in the intrastate fares to those stations. It follows that if the increased intrastate rates are invalid, the increased interstate rates to the Wisconsin villages must also fall. The District Court, therefore, properly set aside the order relating to the fares to Zenda and Walworth, Wisconsin.

ARGUMENT.

I.

THE INTERSTATE COMMERCE COMMISSION HAS NO JURISDICTION OVER INTRASTATE PASSENGER RATES UNLESS IT CLEARLY APPEARS THAT THE EXISTING RATES, AS FIXED BY THE ILLINOIS COMMERCE COMMISSION, RESULT IN DISCRIMINATION AGAINST INTERSTATE COMMERCE.

Primary jurisdiction over intrastate rates is in the state authorities. Rates fixed by a state commission cannot be overturned by the Interstate Commission unless and until justification for the exercise of Federal power clearly appears.

As said in *North Carolina* v. *United States*, 325 U. S. 507 (510-11):

> "Neither Section 13(4), nor any other Congressional legislation, indicates a purpose to attempt wholly to deprive the states of their primary authority to regulate intrastate rates. Since the enactment of Section 13(4), as before its enactment, a state's power over intrastate rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section. * * * A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet a high standard of certainty. Before the Commission can nullify a state rate, justification for the 'exercise of the federal power must clearly appear.'"

And in *Mississippi Public Service Commission* v. *United States*, 124 Fed. Supp. 809 (aff'd. 349 U. S. 908), the court set aside and enjoined enforcement of an order of the In-

terstate Commerce Commission purporting to fix intrastate rates under Section 13. The Court thus stated the principles governing the application of that section (p. 813):

> "The true rule is that, whenever the Commission attempts to exert the power to interfere with intrastate rates which are otherwise in the dominion of state regulation, the justification for the exercise of such power by the Commission must clearly appear of record. Otherwise, the Commission's action is a clear and unlawful encroachment upon the reserved power and authority of the state.
>
> In order to authorize the Commission to exercise the power to nullify intrastate rates under Section 13(4) of the Act, it must be shown, among other things, (a) that the intrastate rates involved are abnormally low and are not contributing their fair share of the revenue of the carriers involved; (b) that the disparity between the rates is substantial and operates as a real discrimination against and obstruction to interstate commerce; (c) that injury to interstate shippers has resulted and will continue to result because of the disparity in rates; (d) that the proposed rates are just and reasonable; and (e) that a substantial increase in the carriers' revenue will result from the proposed increase in the intrastate rates."

The Interstate Commission has no power to increase rates as fixed by state authority on the ground that those rates do not produce sufficient revenue. Unless there is a showing of discrimination, that is a matter solely for the State Commission.

Section 15(a) of the Interstate Commerce Act confers broad powers on the Interstate Commission to fix *interstate* rates on the basis of revenue so as to insure a fair return for the service rendered.

But the powers thus conferred do not extend to intrastate rates or permit interference by the Interstate Commission with the exercise by the State Commission of its paramount powers over those rates.

Section 1(2)(a) of the Interstate Commerce Act provides that the provisions of the Interstate Commerce Act "shall not apply to the transportation of persons or property * * * wholly within one state."

There is nothing in Section 15a that excepts it from the application of Section 1(2)(a).

As said in *Wisconsin RR. Commission* v. *C. B. & Q. RR. Co.*, 257 U. S. 563 (586):

> "Section 15a confers no power on Congress to deal with intrastate rates. What is done under that section is to be done by the [Interstate] Commission 'in the exercise of its power to prescribe just and reasonable rates,' i. e., powers derived from previous amendments to the Interstate Commerce Act which have never been construed or used to embrace the prescribing of intrastate rates."

The Court, in the *Wisconsin* case, then commented as follows on the effect of Section 13(4) as broadening the powers of the Interstate Commission (257 U. S., at p. 586):

> "When we turn to paragraph 4, Section 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce', it is impossible to escape the dovetail relation between that provision and the purpose of Section 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce," within the ordinary meaning of those words."

The "purpose" of Section 15a, as originally enacted, and as amended, is to empower the Interstate Commission to fix interstate rates that will result in a fair return to the railroad and adequate service to the public. If rates are

fixed under Section 15(a) for interstate commerce, then under Section 13(4) (enacted at the same time as Section 15a), intrastate rates may be raised to the interstate levels so as to avoid the preference or discrimination against interstate commerce prohibited by Section 13(4).

That is the meaning of the reference in the *Wisconsin* case to the "dovetail relation" between Section 13(4) and Section 15a. But, as the Court clearly stated in that case, in the absence of a showing that the intrastate rates cause a preference or discrimination against interstate commerce the Interstate Commission has no power, under Section 15a or otherwise, to pass on or to increase the intrastate rates.

As said in the *Wisconsin* case, in order for the Interstate Commission to have authority to intervene and fix intrastate rates, it must appear that there is a "*disparity*," *i. e.*, an inequality, between intrastate and interstate rates, resulting in an "undue, unreasonable, or unjust discrimination" against interstate commerce.

Section 13(3) authorizes the Interstate Commission, on its own motion on petition of the carrier, to conduct an investigation (in cooperation with state authorities, if the Interstate Commission so elects) of any intrastate rate imposed by state authority. Section 13(4) provides that whenever, as a result of such investigation, the Interstate Commission finds that such rate imposed by state authority causes:

> (1) "Any undue, or unreasonable advantage, preference or prejudice, as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand;" or
>
> (2) "Any undue, unreasonable or unjust discrimination against interstate or foreign commerce,"

the Interstate Commission may intervene and prescribe a rate—or a maximum or minimum limitation thereon—

which "in its judgment will remove such advantage, preference, prejudice or discrimination."

The petition of the Milwaukee Road (R. 24-27), on which the proceeding before the Interstate Commission rests, made no claim that the intrastate passenger rates of fare complained of cause any advantage, preference or prejudice as between persons or locations. The petition rests wholly on the averment that the intrastate rates attacked cause "undue, unreasonable and unjust discrimination" against interstate commerce.

The basic question in the case is, therefore, whether or not any discrimination against interstate commerce has been shown to exist.

II.

There Is No Showing That the Intrastate Rates Attacked Discriminate Against Interstate Commerce, and the Interstate Commerce Commission Therefore Had No Jurisdiction Over the Intrastate Fares in Suit.

To sustain a finding that intrastate rates discriminate against interstate commerce, so as to confer jurisdiction over such rates on the Interstate Commission, it must appear from the evidence and supporting findings:

(a) That the intrastate rates complained of are lower than interstate rates for similar service; and

(b) That the contribution to total railroad income from the intrastate service in question is proportionately less than the corresponding contribution from interstate service.

Neither element is shown by the evidence or findings in this case.

A.

No Discrimination Against Interstate Commerce Was Shown Because It Did Not Appear That the Rates of Fare Charged in the Milwaukee Road's Intrastate Passenger Service Are Less Than the Rates Charged for Similar Service in Interstate Commerce.

"Discrimination" in the sense here used, is defined in Webster's International Dictionary, as follows:

> "A distinction, as in treatment, esp., an unfair or injurious distinction. Specif., arbitrary imposition of unequal tariffs for substantially the same service; a difference in treatment made between persons, localities, or classes of traffic, in respect of substantially the same service."

The discrimination against interstate commerce with which the Interstate Commission is authorized to deal by Section 13(3) and (4) is discrimination caused by intrastate rates or fares. Intrastate rates may cause discrimination against interstate commerce if they are lower than the comparable interstate rates.

The existence of such a difference is not alone enough to justify the Commission in finding discrimination against interstate commerce and ordering an increase in intrastate rates (*North Carolina* v. *United States*, 325 U. S. 507 (516); but the finding of lower intrastate rates is the first necessary step in justifying action by the Interstate Commission under Section 13(4).

In an extensive examination of the orders of the Interstate Commission, with respect to intrastate rates entered under the authority of Section 13(4)—nearly 100 orders—we have been unable until the present case to find one instance in which the Interstate Commission asserted the right, or assumed the power, to fix intrastate rates at a level higher than interstate rates for similar service.

Thus, in *King* v. *United States*, 344 U. S. 254 (268), the Court, in upholding the order of the Interstate Commission raising Florida freight rates to the same level as interstate freight rates, quoted with approval the finding of the Commission that

> "No intrastate rate or charge shall be increased so that it will exceed the lowest level of the corresponding rates or charges contemporaneously maintained generally on interstate traffic to and from Florida points * * *."

In the instant case, there were no findings as to the relationship between the intrastate and interstate rate structure.

The only evidence as to interstate passenger fares is the tabulation read in evidence by this appellee, and set forth at page 11, above which shows interstate passenger rates to be at the same level as comparable intrastate rates—before giving effect to the increases approved by the Interstate Commission. That tabulation was introduced in evidence over the objection of the Milwaukee Road that evidence as to interstate fares is "immaterial to the present case." (R. 349.)

But we do not have to look solely to the tabulation to show similarity in existing rates. The report of the Interstate Commission finds that before the increases granted, both intrastate and interstate passenger fares were fixed equally at 2.5 cents per mile (R. 29). The order of the Interstate Commission directs that the intrastate passenger rates be raised to 3 cents or more per mile (R. 34). Thus, if the order is permitted to go into effect, the intrastate rates will be higher than comparable interstate rates.

The report of the Interstate Commission seeks to justify this disparity by the following comment (R. 36):

> "The one-way and round-trip fares here approved for respondent's [the Milwaukee Road's] suburban

> area, like those approved for the North Western and the Illinois Central, will be at a higher rate per mile than the corresponding fares to and from its non-suburban points. However, as we said of the North Western, this will be offset by the fact that respondent's multiple and commutation fares for the longer hauls in the suburban area will be at a lower rate per mile than any of its non-suburban fares."

The foregoing statement—assuming it to be accurate—furnishes no justification for the increase of any intrastate rate to an amount beyond the rate charged for similar service in interstate commerce.

The fact that the rates per ride per mile on commutation or multiple ride tickets for long hauls in intrastate service are less than the single ride rates in interstate passenger service, does not justify fixing intrastate rates for shorter hauls at rates higher than those charged for similar service in interstate service.

The prior proceedings referred to in the Commission's report do not support the conclusion that the base rate for intrastate passenger service may be increased to an amount exceeding the corresponding rate in interstate commerce, merely because commutation or multiple fare rates are at a less rate per mile per ride.

Whatever may be the fact as to the relation between intrastate and interstate fares on the North Western (which does not appear of record), the statements of the Interstate Commission that one-way and round-trip fares for the Illinois Central were approved "at a higher rate per mile than the corresponding fares to and from its non-suburban points" is in error.

On the contrary, in the *Illinois Central* case, the Interstate Commission and the Court expressly disapproved an increase in single ride or round-trip rates because the ex-

isting rates were already as high, or higher, than interstate rates for similar service.

The Illinois Central rate proceeding was reviewed by the District Court and is reported in *Illinois* v. *United States*, 101 Fed. Supp. 36 (aff'd 342 U. S. 930).

In that case, the Illinois Central filed a petition under Section 13(4) asking the Interstate Commission to prescribe increased prices for round-trip and multiple fare tickets. The Commission allowed the increase in multiple fare tickets, but disapproved any increase in single-ride and round-trip rates which were already as much or more than corresponding rates in interstate commerce. As to single fare and round-trip rates the Commission's order contains the following finding, which was approved by the Court (101 Fed. Supp., at p. 45):

> "2. That in connection with its minimum and round-trip suburban fares petitioner has not shown any person-locality or revenue discrimination against interstate commerce."

The rates on multiple fare tickets were increased by increasing the ratios of the cost of those tickets to the single ride fares. The increased ratios as fixed for the Illinois Central are the same as those fixed by the Illinois Commission for the Milwaukee Road (R. 29).

We submit that in the absence of evidence to show that intrastate passenger rates are lower than comparable interstate rates, there was no basis for a finding of discrimination against intrastate commerce that would empower the Interstate Commerce Commission to intervene and to increase intrastate passenger rates theretofore fixed by state authority.

B.

No Discrimination Against Interstate Commerce Was Shown Because There Is No Evidence or Finding as to What Revenue Is Required from Suburban Passenger Traffic in Order to Determine What Constitutes a Fair Proportionate Contribution to the System Revenue of the Milwaukee Road.

Before the Interstate Commission can intervene and raise intrastate rates, it must be shown not only that there is a discrepancy between those rates and the interstate rates, but also what would be the amount of contribution from intrastate suburban traffic that would constitute a fair proportion of the total system revenue.

In holding a Section 13 order of the Interstate Commission invalid, this Court said:

> "The Commission made no findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income."
>
> *North Carolina v. United States*, 325 U. S. 507, 516.

In the instant case, there was likewise no finding as to what the total revenue of the railroad was, or as to what contribution of revenue was made by the interstate traffic.

The finding on which the Interstate Commission rests, in its conclusion that the intrastate suburban rates discriminate against interstate commerce, is Finding 4 (R. 37), set forth at page 10, above.

In that finding the Interstate Commission merely concludes that the prescribed intrastate fares are "necessary so that the travel thereunder may make a fair contribution toward respondent's [the Milwaukee Road's] indirect costs and return on investment * * *."

That conclusion has nothing to rest on in the absence of

some showing in the record as to what contribution is made from other parts of the system.

The contention of the Interstate Commission that the requirement that there be a subsidiary finding as to what would constitute a fair proportionate contribution to the system is "hyper-technical", has no merit. The defect is one of substance, not of form.

In the briefs of both the Interstate Commission and the Milwaukee Road, it is asserted that the finding that the prescribed intrastate fares would make a fair contribution toward the Milwaukee Road's indirect costs, is sufficient without subordinate findings, or evidence, to show what would constitute a fair proportionate contribution from the intrastate passenger traffic.

An examination of the cases cited shows that they do not support that proposition.

In *King* v. *United States* (1952), 344 U. S. 254, the following finding was held sufficient to sustain an order of the Interstate Commission increasing intrastate freight rates:

> "The establishment of intrastate rates and charges increased sufficiently to equal the level herein approved will substantially increase respondent's revenues therefrom, and will constitute not more than a fair proportion of respondent's total income."

That finding was the result of numerous comparisons between intrastate and interstate traffic. The Court specifically drew attention to the fact that the finding of a fair proportionate contribution was backed up by a finding (p. 271) that:

> "The transportation conditions incident to the intrastate transportation of freight in Florida are not more favorable and such conditions in the Florida peninsula are somewhat less favorable than those (1) within southern territory and (2) between Florida and interstate points."

The Court continued (p. 272):

> "The Commission has applied to the Florida operations the same conclusion it reached as to the need for increased revenue on a national basis and has distributed the burden within Florida along the same lines it followed when estimating the revenues available in the southern territory from intrastate as well as interstate operations."

In *Florida* v. *United States* (1933), 292 U. S. 1, (10-11), it appears there were most extensive findings from which the relative contributions from the intrastate freight traffic in question and like traffic in interstate commerce could be ascertained.

In none of the other cases cited does there appear to have been an absence of evidence and findings sufficient to show what would constitute a fair proportionate contribution of revenue from the intrastate traffic in suit.

In the instant case, the Interstate Commission's order simply asserts that intrastate passenger fares should be fixed at the highest level the traffic will bear—irrespective of whether any like rule is applied to interstate rates.

No evidence was offered to show that interstate passenger traffic is making a contribution to revenue comparable to that of intrastate traffic.

There is thus no finding and no evidence to show that the increased fares prescribed for the intrastate passenger traffic are required in order that the contribution therefrom shall be fairly proportionate to contributions from other branches of the system, or are necessary to avoid discrimination against interstate traffic.

If the Interstate Commission is permitted to expand its jurisdiction as claimed in this case and can fix intrastate rates for the purpose of increasing railroad revenue with-

out the necessity of making any comparison between intrastate and interstate rates or revenues, the following will result: State commissions will lose all jurisdiction over intrastate passenger rates. The standard of rate making will be so vague that it could be neither followed nor reviewed.

The Interstate Commerce Act leaves to the states all jurisdiction over railroad traffic "wholly within one state"—subject only to the exception provided in Section 13(4) where prejudice or unjust discrimination against interstate commerce is clearly shown.

A large part of the activities of railroads within a state cannot be reached by the Interstate Commission under Section 13. A state commission alone may establish standards of service and call the carrier to task for poor equipment. For example, in the instant case, the evidence shows how the Illinois Commission in the prior rate case showed to the Milwaukee Railroad how it could save approximately $1,000,000 a year by converting its suburban operations from steam to diesel locomotives (R. 82)—and thus served as an effective agent in bringing about that conversion, to the immense benefit of the railroad and of the travelling public.

The public interest is thus furthered by the policy, inherent in the Interstate Commerce Act, of leaving to the state commission the power and duty to prescribe rates and standards of service for intrastate traffic—in the absence of a clear showing that state regulation results in unjust discrimination against interstate commerce.

III.

The Evidence Does Not Support the Finding That the Increased Fares as Fixed by the Interstate Commerce Commission Are Just and Reasonable.

The report and order of the Interstate Commission find that the increase in fares approved for the Milwaukee Road will result in fares that are just and reasonable for the future (Fdg. 4; R. 37).

That finding is essential to the validity of the order; but an examination of the record shows it has no support in the evidence.

The finding in question rests on the statement in the Interstate Commission's report that there is "a strong similarity" between the suburban territory served by the Milwaukee Road and that served by the North Western and hence that the schedule of North Western fares, summarized in the report, should be used as a basis in fixing fares for the Milwaukee Road (R. 35-6).

In the opposing briefs, the Interstate Commerce Commission and the Milwaukee Road suggest other matters—such as cost and wage indices, fares on buses and other transportation media—as reasons supporting the reasonableness of the fares prescribed by the Interstate Commission. But the report and order of the Interstate Commission make clear that the fares fixed were on the basis of what the traffic will bear, and that it was decided that the sole test of reasonableness was the present rates of fare of the North Western (R. 35).

There is no evidence to support any finding or conclusion that the Milwaukee Road's suburban operation is similar to that of the North Western, and that the same rates of fare should be prescribed for the Milwaukee Road as those fixed for the North Western.

The conclusion that there is "a strong similarity" between the suburban service of the two roads is based solely on an inaccurate reference to the testimony of J. K. Pain, Assistant General Passenger Agent of the Milwaukee Road (R. 35).

The phrase, "a strong similarity," is lifted out of context. An examination of the full testimony of this witness shows that he referred to the similarity in the territory served, but emphasized the difference in operation.

The full colloquy between the Examiner and the witness is as follows (R. 177-180):

> "Exam. Fuller: I would like to ask a question which is more or less the $64.00 question. I think you ought to explain a little more just why you are proposing these different bases and why you are proposing a higher basis than the North Western basis when you were at one time on the same basis.
>
> A. Well, of course, I am not prepared to go into the cost or the expense. I believe there is a difference in the operation of the two roads. I think each road has a different,—
>
> Exam. Fuller: I just wanted to ask that question from the standpoint of traffic.
>
> The Witness: Well, I am really not prepared to go into the cost, as I say, or the expense. That is a little bit out of my line. But, the increase, of course, endeavored to be figured on the most equitable basis that would recover our losses. That is the only way I can answer it now. A basis that would be equitable, that would be fair to the suburban passenger.
>
> Exam. Fuller: You said your increased revenue would be $518,000.
>
> The Witness: Yes, $518,000 in round figures.
>
> Exam. Fuller: I believe the North Western's one way basis in the suburban area is three cents with a minimum of 20 cents.
>
> The Witness: Yes.
>
> Exam. Fuller: What are you proposing?
>
> The Witness: We are proposing 3.2.

Exam. Fuller: With a minimum of 25 cents?

The Witness: Twenty-five cents.

Exam. Fuller: Why do you think you should get more from a traffic standpoint than the North Western?

The Witness: Well, is this off the record?

Exam. Fuller: No, I want this on the record.

The Witness: Well, I really couldn't—I don't know why we should get any more unless probably our conditions are different on our railroad. We probably need more money. Need more revenue."

* * * * *

Exam. Fuller: Well, so far as the nature of the suburban communities you serve, and the nature of your line—you have two lines. The North Western has three, I understand. Your territory is pretty similar.

The Witness: Well, in what respect, sir? You mean geographically or in operation, or what?

Exam. Fuller: I am just talking about the nature of the suburban community.

The Witness: Yes, you could probably say there is strong similarity.

Exam. Fuller: That is all I have. Are there any other questions now?"

Following the foregoing colloquy, the attorney for the Milwaukee made the following statement: "We do not offer these North Western fares as criteria of what our fares should be" (R. 180).

It is on this evidence that the Commission rested its decision to grant to the Milwaukee Road the fares charged by the North Western. No evidence was offered showing similarity of equipment, service, or operating conditions. In fact, the Milwaukee Road expressly refuted the propriety of a comparison of its rates with those of the North Western.

The record shows that the lines are not comparable. The present suburban North Western rates are based upon a suburban operation of 72 steam locomotives and only three

diesel locomotives (R. 347), as against a complete diesel operation on the Milwaukee. A comparison of the cost of the Milwaukee suburban operation under steam and diesel locomotives shows that the diesel operation costs the Milwaukee Road approximately $900,000 a year less than steam (See tabulation, p. 16, above).

The statement in the brief of the Interstate Commission (p. 29) that "as the Commission points out in its report after a joint hearing by the two commissions in 1951, the commutation fares of this railroad [the Milwaukee Road] had been placed on the same level as those of the North Western," proceeds from a false inference as to the purport of the Interstate Commission's report.

As appears from that report (R. 29-30), the 1951 proceeding as to the suburban passenger rates of the Milwaukee Road started as a joint hearing, but the proceeding before the Interstate Commission was dismissed, and the final hearings and order were those of the Illinois Commission.

The Interstate Commission's report in the instant case states in cents per mile the intrastate and interstate passenger fares on the Milwaukee Road and the ratios used to determine therefrom the cost of multiple-ride tickets. The only fares stated to have a similarity to those of the North Western are commutation fares (R. 29)—and whether that similarity is in amount or in method of ascertainment is not clear.

At any rate, it has been clearly stated by the Interstate Commission that the rates of passenger fares as now prescribed for the North Western cannot properly be used as a basis for establishing fares for a diesel operation like that of the Milwaukee Road. The proceeding in which the North Western's suburban fares were raised to their present high level is *Commutation and Multiple Fares between Illinois and Wisconsin*, 288 I. C. C. 15. In that case the

Interstate Commission's report includes the following (p. 23):

> "The above analysis [on which the Commission's order was based] relates to an existing suburban operation for the year 1951 and obviously does not contemplate the cost of some other suburban operation such as might be encountered with diesel engines, gallery-type cars and Budd cars."

The Interstate Commission, in fixing fares for the North Western, has also taken into consideration the fact that the Milwaukee division of the North Western carries no freight whatsoever and that the entire costs there must be borne by passenger traffic.

> *Commutation Fares Between Chicago and Wisconsin*, 279 I. C. C. 773, 777-778.

In view of the difference in operating conditions between the suburban services of the Milwaukee Road and the North Western, the use of the North Western rates of fare, as a measure of rates to be fixed for the Milwaukee Road, cannot be justified.

As was said by the Illinois Supreme Court in reversing an order of the Illinois Commission which approved certain rates on the ground that like rates were fixed on another line:

> "Nor can the order be sustained upon mere findings making comparison between the rates attacked and the rates and ton-mile earnings elsewhere. * * * To afford a sufficient basis for comparison there must be findings of fact showing such similar conditions of operation as well as findings as to the distances and rates."
>
> *C. & E. I. Ry. Co.* v. *Commerce Commission*, 343 Ill. 117 (125).

The Milwaukee suburban operation is much more comparable to the suburban operation of the Burlington and

Rock Island than it is to the North Western operation. Those are the other two Chicago railroads using diesel locomotives. The Commission, nevertheless, ignored that comparison (R. 345) and held, in effect, that the Illinois Commission was wrong in giving weight to it.

Without sufficient evidence of comparability in operation, there is no ground for fixing the Milwaukee Road's fares at the North Western level, or for finding that the resulting fares are just and reasonable.

IV.

THE INTERSTATE COMMISSION HAS NO JURISDICTION TO INTERVENE ON PETITION OF THE CARRIER AND TO FIX ILLINOIS INTRASTATE PASSENGER RATES, WHERE THE ILLINOIS COMMISSION HAS BEEN GIVEN NO OPPORTUNITY TO PASS ON SUCH RATES UNDER THE CONDITIONS AND ACCOUNTING METHODS ON WHICH THE CASE IS PRESENTED TO THE INTERSTATE COMMISSION.

A.

The Interstate Commission Has No Jurisdiction, on Petition of a Carrier, to Nullify Intrastate Rates Unless Those Rates Were Fixed by State Authority Upon a Fair Presentation of the Facts and Accounting Theory Relied Upon, and Their Effect Is to Cause an Undue, Unreasonable or Unjust Discrimination Against Interstate Commerce.

As shown under Point I of this brief, the state authorities have primary jurisdiction over intrastate rates. (See p. 29, above.)

The Interstate Commission has no jurisdiction to intervene and to set aside rates fixed by a state commission un

less and until justification for exercise of Federal power is clearly shown.

North Carolina v. *United States*, 325 U. S. 507 (510-11).

And see:

Illinois Central R. R. Co. v. *Public Utility Commission*, 245 U. S. 493 (510),

cited with approval in the *North Carolina* case.

The Interstate Commission thus has no jurisdiction under Section 13(4) to set aside an order of a state commission fixing intrastate rates unless it clearly appears that the state commission, by its action, caused an undue, unreasonable and unjust discrimination against interstate commerce.

Before its application to the Interstate Commission in this case, the Milwaukee Road requested an increase in fares from the Illinois Commission. A summary of the proceedings before the Illinois Commission is set forth at pages 14 to 20, above. As there shown, the Milwaukee Road presented evidence and relied on an accounting theory that was different from the evidence and accounting theory relied on in the Interstate proceeding. The duty of a carrier requesting a fare increase, to present its case to the state commission, is not discharged when the case presented to the state commission is different in fact and theory from that presented to the Interstate Commission.

The purpose of Section 13(4) of the Interstate Commerce Act is to protect interstate commerce from rates "made or imposed by authority of any State" that discriminate unreasonably and unjustly against interstate commerce. The State still has the primary jurisdiction of determining what intrastate rates are just and reasonable; but Section 13 gives the Interstate Commission the power to fix intrastate rates, when the rates fixed by State authority are shown

clearly to have caused undue, unreasonable and unjust discrimination against interstate commerce.

The requirement that there must be an initial application to State authority to determine just and reasonable intrastate rates before (or at the same time that) application is made to the Interstate Commission under Section 13(4), is well established. Of the many Section 13 cases appearing in the court reports, including all those cited by the United States and Interstate Commission in their brief, there is not one where a carrier sought a new level of fares directly from the Interstate Commission under its Section 13(4) power without making application to a State commission.

The language of the statute permitting federal action where rates are "made or imposed by authority of any State" taken together with the holding in *North Carolina* v. *United States*, 325 U. S. 507, quoted from above (p. 29), makes clear the requirement of initial action by state authority.

The necessity for prior state action is recognized in *Florida* v. *United States*, 282 U. S. 194, where the Court said (p. 209):

> "* * * While the 'Cummer scale' of rates was not prescribed by the Florida Railroad Commission and was not the result of any affirmative action on its part, these rates were maintained in intrastate commerce subject to the authority of the State and were published as required by its laws. These rates may thus be regarded as made by the authority of the State and within the purview of the Act. * * *"

In the *Florida* case, no prior application was made to the Florida Commission, but under the circumstances, none was called for. The proceeding before the Interstate Commission was initiated by the *Georgia* Public Service Commission, which was complaining against rates within *Florida* that the carrier and the Florida Commission had both found

satisfactory. In that case, a Section 13 (4) proceeding was the only way by which the Georgia Commission could obtain redress.

The *Illinois Central* case—*Illinois* v. *United States*, 101 Fed. Supp. 36, aff'd 342 U. S. 936 also is not authority to the contrary. In that case there were concurrent applications to the two commissions and a joint hearing, so that the same evidence was presented to each commission. On that evidence, the Illinois Commission first fixed the rate that the Interstate Commission found to be unfairly discriminatory against interstate commerce—and hence subject to be set aside under Section 13.

And this is also true of *North Carolina* v. *United States*, 128 Fed. Supp. 718; aff'd 350 U. S. 805.

A holding that the Interstate Commission may, under Section 13 (4), proceed to set rates even if no application has been made to a state commission for a rate increase, would effectively deprive the states of all jurisdiction over intrastate rates and destroy the orderly administrative procedure so well established. Under such a rule, a carrier could appeal to Federal authority for setting of intrastate rates on the ground that interstate commerce would be burdened unless rates were increased, even though the proper state commission might, if it had been applied to, have granted a new scale of just and reasonable rates that would cause no discrimination against interstate commerce.

B.

The Milwaukee Road Presented Different Evidence and Relied Upon a Different Accounting Theory Before the Illinois Commission From That Presented and Relied On Before the Interstate Commission. The Order of the Illinois Commission Was Correct On the Case There Presented and Hence the Rates Imposed Did Not Cause Undue, Unreasonable or Unjust Discrimination Against Interstate Commerce Within the Meaning of Section 13 (4).

In the Milwaukee Road's petition to the Illinois Commission, it asked for an increase in fares on the ground that the then existing fares were insufficient "to permit operation of the Chicago suburban service without an out-of-pocket loss." (R. 77.) The Illinois Commission found that (with diesel operation) there was, or should be, no such loss and therefore entered an order denying the petition (R. 91). No appeal was taken from that order.

The Milwaukee Road now seeks to have the Interstate Commission intervene, and thereby to nullify the Illinois Commission's order, on the ground that the effect of that order is to cause a discrimination against interstate commerce.

There is no basis for such intervention by the Interstate Commission. The Illinois Commission's order was correct on the theory of the case presented by the Milwaukee Road—and there is no ground upon which the order can be found to be unfair or unjust. If a new theory of costs is to be adopted, it should be presented to the Illinois Commission (or jointly to the two Commissions) before the Interstate Commission is asked to exert its authority under Section 13.

The alleged losses claimed by the Milwaukee Road in the

case before the Illinois Commission were incurred in 1952, when the Milwaukee Road was operating its suburban service with steam locomotives.

The Illinois Commission found "that conversion to diesel operation would reduce petitioner's [Milwaukee Road's] operating costs approximately $1,000,000 per year," and that after such saving, the out-of-pocket expenses would be exceeded by revenues (R. 91). On that basis, the Illinois Commission denied the proposed increase in fares.

The evidence in the present proceeding supports the Illinois Commission, if the same accounting basis is used.

In the case before the Illinois Commission, the Milwaukee Road expressly represented that depreciation was not, and should not be, considered as an out-of-pocket expense. As stated by the Milwaukee Road in its Exhibits 25 and 26 in the Illinois case (included in Protestant's Ex. 21, R 401-10, 274) depreciation of locomotives and coaches is "not included in the out-of-pocket cost."

Likewise, in the case before the Illinois Commission, the Milwaukee Road did not include in out-of-pocket expense, certain maintenance-of-way accounts involving maintenance of facilities (such as road bed, etc.) which would have to be maintained even if there were no suburban service.

As to the reasons for not including those accounts—as well as depreciation—among the items included in out-of-pocket expenses in the Illinois case, R. S. Stephenson, Comptroller of the Milwaukee Road, testified (R. 203):

> "In the case before the State [*i.e.*, the Illinois Commerce Commission] there was such a margin between the expenses and revenues that some of these items didn't seem to be important at the time."

If operating figures found by the Examiner in the present case are adjusted so as to eliminate the items of depreciation and the maintenance-of-way accounts not claimed as

out-of-pocket expenses in the Illinois case, little, if any, out-of-pocket deficit is shown.

This appears from the tabulation at page 18 above.

The adjusted deficit for 1954 of $47,866 is the figure found by the Interstate Commission with only the adjustments made for the expenses claimed in the case before the Interstate Commerce Commission which were not claimed in the case before the Illinois Commission. If the figures are adjusted further for the increase in revenues shown in the last 4 months of 1954, the annual deficit is $21,056. Further adjustment of expenses to allow for the partial use of steam engines and non-suburban diesels during the base period would probably eliminate that small deficit.

It follows that the loss in suburban operation, which is the basis of the Interstate Commission order here complained of, could not have been found by the Illinois Commission to exist, because of the difference in the evidence presented to the Illinois Commission. Since the Milwaukee Road, in the Illinois proceeding, took the position that reasonable suburban rates should be based at a level which would produce revenues to meet out-of-pocket expenses, it is clear from the findings of the Interstate Commission that the order of the Illinois Commission was correct on the facts presented to it. If different evidence is to be offered, or a different basis of fares is to be proposed, the Illinois Commission must be given a chance to fix rates on that evidence and to consider that new basis of fares.

The failure of the Milwaukee Road to go to the Illinois Commission with its new evidence of post-diesel operation, and its new cost theory cannot be justified by any claim that the Illinois Commission acted unfairly or unjustly, or that the Illinois Commission would not set just and reasonable rates if application were made to it.

As the District Court said in this case (R. 470):

"In the instant case justification for the exercise of the federal power to nullify state rates does not clearly appear."

V.

In View of the Finding by the District Court that the Interstate Commission's Order Increasing Intrastate Suburban Rates Was Invalid, the District Court Properly also Held Invalid and Set Aside the Interstate Rates to Zenda and Walworth, Wisconsin, Which Depend for Their Validity on the Intrastate Rates to Intervening Stations.

The Interstate Commission, in its brief (pp. 41, *et seq.*) argues that the increases in interstate fares to Zenda and Walworth, Wisconsin, should have been allowed by the District Court to stand, even though the increase in the intrastate fares is invalid.

This point is not raised in the brief of the Milwaukee Road. It has no merit.

Walworth and Zenda are at the end of the north suburban line of the Milwaukee Road and are served by one suburban train a day in each direction—in addition to two through trains which stop at Walworth.

The interstate fares to those two Wisconsin stations were increased so as to correspond with the increases directed by the Commission in the intrastate suburban fares between Chicago and intervening stations in Illinois.

No evidence was offered relating particularly to the fares to the two Wisconsin stations. The question as to the validity of the increases in those fares rests wholly on the determination as to the validity of the increases in the intrastate fares to the intervening stations, and has no independent status.

The brief of the Interstate Commission (p. 41) states or infers that the complaint in the District Court did not ask that the order with respect to interstate fares to Wisconsin stations be set aside. That statement, or inference, is in error.

This is clear from the prayer of the complaint which asks (R. 22):

> "That this (District) Court, or the Judge to whom this complaint is presented, shall issue a temporary restraining order:
>
> (i) Enjoining the Interstate Commerce Commission from enforcing its said report and orders dated November 21, 1955 and March 2, 1956, in its Docket No. 31742 (Exhibits B and E attached); and
>
> (ii) Enjoining the Milwaukee Road from putting into effect the fares prescribed in said report and orders; * * *"

The orders of November 21, 1955 and March 2, 1956, referred to (R. 41, 76) authorize increases in both interstate and intrastate fares, and the complaint is directed to both orders.

Necessarily, the pleadings and evidence, and the reports, orders and decree involved, refer principally to the intrastate rates, as the case, as presented by the petition of the Milwaukee Road, depends on the jurisdiction of the Interstate Commission under Section 13(4) of the Interstate Commerce Act—and therefore relates primarily to the question of the right of the Interstate Commission to pass on intrastate rates.

But, there is no claim by the Milwaukee Road of an independent justification for an increase in rates to the two Wisconsin stations at the end of the line unless a like justification exists as to the rates to the intervening stations.

The decree of the District Court is correct in setting aside the order of the Commission relating to interstate suburban fares, along with the order as to intrastate fares. If the increase in intrastate fares cannot stand, the increase in interstate fares must also fall.

Conclusion.

We submit that for the reasons above set forth, the order of the District Court should be affirmed.

Respectfully submitted,

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